

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2008 MSPB 237

Docket No. SF-4324-08-0284-I-1

**Joseph A. Williams,
Appellant,**

v.

**Department of the Treasury,
Agency.**

October 29, 2008

Joseph A. Williams, Temple Terrace, Florida, pro se.

Melissa A. Ford, Esquire, Atlanta, Georgia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the May 2, 2008 initial decision (ID) that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) for lack of jurisdiction. For the reasons discussed below, we GRANT the PFR under [5 C.F.R. § 1201.115](#)(d), REVERSE the ID, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal in which he alleged, inter alia, that the agency violated his rights under USERRA.¹ Initial Appeal File (IAF), Tabs 1, 3. The administrative judge (AJ) informed the appellant of the standard for proving jurisdiction in his case and ordered him to prove jurisdiction. *Id.*, Tab 2 at 7-10. Both the appellant and the agency responded to the AJ's order, the agency moving to dismiss the appeal for lack of jurisdiction. *Id.*, Tabs 4, 5, 7.

¶3 In his ID, the AJ found as follows: The Office of Personnel Management, on behalf of the agency, posted a vacancy announcement for Tax Compliance Officer (TCO) positions with the Internal Revenue Service (IRS) throughout the United States, including jobs in Las Vegas, Nevada; San Jose, California; and San Rafael, California. The appellant applied for positions in those three locations. The agency conducted one courtesy interview in Tampa, Florida, where the appellant resided, for all of the positions. The interview panel did not recommend him for the positions. The interview panel's notes were forwarded to the hiring coordinator in Las Vegas, the hiring coordinator passed the interview panel's objection to the appellant to the IRS personnel office, and the personnel office sustained the objection. The San Jose position was filled through the internal applicant certificate generated for the position and no one on the external applicant certificate was considered. The interview panel's notes were not timely forwarded to the hiring coordinator in San Rafael, and, therefore, its objection to the appellant was not sustained by the personnel office. Thus, in accordance with the Delegated Examining Operations Handbook, the agency offered the appellant

¹ Although the appellant also alleged that the agency violated other statutes and regulations, those allegations are the subject of separate appeals. To the extent that the appellant has moved that the Board join his appeals, PFR File, Tab 1 at 8-10, 24-25, we DENY the motion. We find that joinder would not expedite the processing of his appeals. *See Smith v. Department of Defense*, [106 M.S.P.R. 228](#), ¶ 7 n. 2 (2007); [5 C.F.R. § 1201.36\(b\)](#).

an identical job in Walnut Creek, California, which the appellant accepted and for which he reported on January 22, 2007.² ID at 5.

¶4 The AJ dismissed the appeal for lack of jurisdiction without holding the appellant’s requested hearing. ID at 1, 6. The AJ found it undisputed that the hiring officials were aware that the appellant was a veteran. *Id.* at 5. The AJ found, however, that the appellant failed to make a non-frivolous allegation that he was discriminated against based on his veteran status or that he took action to enforce or exercise a preference-related protection afforded under [38 U.S.C. Chapter 43](#). *Id.* at 5-6. Therefore, the AJ found that the appellant failed to make non-frivolous allegations of fact that, if proven, would establish a USERRA violation. *Id.* at 6.

¶5 The appellant has filed a PFR. PFR File, Tab 1. The agency has filed a response opposing the PFR. *Id.*, Tab 3.

ANALYSIS

¶6 The appellant asserts, inter alia, that the AJ erred in finding that he failed to establish jurisdiction over his USERRA appeal, and that the AJ, in fact, decided the merits of the appeal. PFR File, Tab 1 at 4-6, 10-11. We agree.³

¶7 USERRA provides in relevant part that “[a] person who . . . has performed . . . service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment . . . on the basis of that . . . performance of service.” [38 U.S.C. § 4311\(a\)](#). The statute further provides that an employer (including a federal agency) shall be considered to have engaged in a prohibited activity if the individual’s military status is a motivating factor for one of the actions identified above, unless the employer can prove that the action would have been taken in the

² The appellant subsequently resigned from that position.

³ Because we are remanding this appeal for a hearing and a decision on the merits, we find it unnecessary to address in this Opinion and Order the other arguments the appellant raises related to the merits of his appeal.

absence of the military status. [38 U.S.C. § 4311](#)(c)(1). An individual who believes that he has been the victim of a violation of section 4311(a) may file an appeal with the Board. 38 U.S.C. § 4324(b).

¶8 To establish Board jurisdiction over a USERRA discrimination appeal, an appellant must allege that: (1) He performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Heckman v. Department of the Interior*, [109 M.S.P.R. 133](#), ¶ 24 (2008); *Dale v. Department of Veterans Affairs*, [102 M.S.P.R. 646](#), ¶ 14, *review dismissed*, 199 F. App'x 948 (Fed. Cir. 2006). A claim of discrimination under USERRA should be broadly and liberally construed in determining whether it is non-frivolous, particularly where, as here, the appellant is pro se. *Baney v. Department of Justice*, [109 M.S.P.R. 242](#), ¶ 14 (2008). Our reviewing court, the U.S. Court of Appeals for the Federal Circuit, has noted with approval the Board's "liberal approach in determining whether jurisdiction exists under USERRA." *Yates v. Merit Systems Protection Board*, [145 F.3d 1480](#), 1484 (Fed. Cir. 1998). The weakness of the assertions in support of a claim is not a basis to dismiss the USERRA appeal for lack of jurisdiction; rather, if the appellant fails to develop his contentions, his USERRA claim should be denied on the merits. *Randall v. Department of Justice*, [105 M.S.P.R. 524](#), ¶ 5 (2007).

¶9 Here, the record shows, and the agency does not dispute, that the appellant performed duty in a uniformed service of the United States. The appellant asserted under penalty of perjury that he is "a preference-eligible veteran, performed uniformed military service from April 11, 1968 to December 10, 1976," and "received an honorable discharge." IAF, Tab 4 at 4, 6. Further, the agency acknowledged that the appellant is a veteran. *Id.*, Tab 4 at 17, 19, 22, 25-28; Tab 7 at 1.

¶10 Moreover, the appellant alleged that he applied under Job Announcement PHJB-6-104547-S1 for a position as a TCO in Las Vegas, San Jose, and San

Rafael; that he was not selected; that several non-veterans were selected; and that the agency's actions were taken because of his prior military service. IAF, Tab 4 at 5-6. To support his allegations, he submitted evidence that he appeared on the list of eligibles for the positions and that non-veterans were selected instead of him. *Id.* at 17-31. Indeed, the agency conceded that it "made a mistake in the San Rafael selection." IAF, Tab 7 at 3. Contrary to the AJ's unsupported statement, ID at 6 n.2, evidence that the agency hired a non-veteran instead of the appellant does constitute a non-frivolous allegation of discrimination sufficient to establish USERRA jurisdiction, *see, e.g., Davis v. Department of Defense*, [105 M.S.P.R. 604](#), ¶¶ 2, 6 (2007); *Dale*, [102 M.S.P.R. 646](#), ¶ 15.

¶11 The appellant asserts that the AJ erred in denying him his requested hearing. PFR File, Tab 1 at 4-5. Again, we agree. An appellant who raises a USERRA claim has an unconditional right to a hearing. *Kirkendall v. Department of the Army*, [479 F.3d 830](#), 844-46 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007). We therefore remand the appeal for a hearing on the appellant's USERRA claim.

ORDER

¶12 Accordingly, we REMAND this appeal to the regional office for further adjudication consistent with this Opinion and Order. The AJ shall provide the appellant with a hearing on his USERRA claim and issue a new ID on the merits of that claim.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.